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the community property approach to determine the widow's loss, the courts have already begun to evolve such criteria. A further extension of the establishment of definite criteria to measure the loss of different plaintiffs will probably result in more awards that actually compensate for the damage sustained.

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Problems of the Retained Employee in Louisiana Workmen's Compensation Law

INTRODUCTION

The problems created by the retention of an injured employee are some of the most confusing in Workmen's Compensation Law. A retained employee is one who has suffered a disability compensable under the Workmen's Compensation Statute, but has been retained by the employer to do such work as he is still able to perform.[1] Retention of the injured employee is thought to be socially desirable since rehabilitation often results from the continued employment.[2] However, several problems arise when the injured employee resigns, is dismissed, or seeks to have his compensation fixed when he is receiving wages. These problems generally are as follows: (1) whether to allow the employer credit for wages paid after the injury; (2) whether an action by the employee to have his compensation fixed, brought during the retention period, is premature; (3) whether prescription has accrued against the claim. Since the issues of wage credit, prematurity, and prescription are closely related, the courts have attempted to achieve consistency within the various rules to be applied to each individually. The result has been confusion because it is impossible to maintain consistency and at the same time reach a desirable solution to the retained employees problem. For instance, it seems desirable for an employee to be able to bring suit to have his compensation claim set even while he is receiving wages. At the same time it appears undesirable to force him to go to court by having prescription run on his claim. It also seems desirable to give an employer credit for wages paid to the employee on a subsequent

1. See MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE § 401 (1951).
2. *Ibid.*

compensation suit. Yet if this is allowed, consistency precludes the employee's being able to bring suit while the wages are being paid.

The first decisions in the problem areas of the retained employee were in harmony. When wages were paid for lighter work, the employer was credited for having made compensation payments.[3] The payments, since considered as compensation, made a suit on the compensation claim premature[4] and interrupted prescription.[5] The real difficulty began with the case of *Carlino v. United States Fidelity and Guaranty Co.*,[6] where it was held that a suit to have compensation set while being paid regular wages for lighter work was not premature. The natural inference from the *Carlino* decision would be that if a suit is not premature when wages are being paid, then such wages must not be considered as compensation and therefore the payments should not interrupt the running of prescription. This interpretation of the case was subsequently adopted.[7] At the same time it would be logical to assume that on the basis of the *Carlino* decision the employer should not be allowed credit as having made compensation payments. Nevertheless, the *Carlino* case gave the employer credit for the wages paid on the compensation judgment.[8] As a result an anomalous situation arose. Wages were considered compensation for the purpose of credit, but not for the purpose of determining prematurity and prescription. The inconsistency of this rule has been minimized by the latest decisions relating to retained employees which have held that *unearned* wages will be considered as compensation to form the basis for a plea of prematurity.[9] In line with this position it has been held that unearned wages will interrupt prescription[10] and also will be credited against the

3. Hennen v. Louisiana Highway Commission, 178 So. 654 (La. App. 1938); Becton v. Deas Paving Co., 3 La. App. 683 (1926).

4. See Ulmer v. E. I. DuPont de Nemours and Co., 190 So. 175 (La. App. 1939).

5. Carpenter v. E. I. Dupont De Nemours and Co., 194 So. 99 (La. App. 1940).

6. 196 La. 400, 199 So. 228 (1940).

7. See Thornton v. E. I. Dupont de Nemours and Co., 207 La. 239, 21 So.2d 46 (1944).

8. Carlino v. United States Fidelity and Guaranty Co., 196 La. 400, 199 So. 228 (1940).

9. See D'Antoni v. Employers' Liab. Assur. Corp., 213 La. 67, 34 So.2d 378 (1948).

10. Thornton v. E. I. Dupont de Nemours and Co., 207 La. 239, 21 So.2d 46 (1944); Chauvin v. St. Mary Iron Works, 55 So.2d 617 (La. App. 1951); Perkins v. American Employers Ins. Co., 53 So.2d 462 (La. App. 1951); Cradeur

employer's compensation liability, at least where the employee is rehired to do different work.[11]

A better understanding can probably be reached by considering each of the three problems individually, and the way in which policy on the one hand and consistency on the other has influenced the decisions.

CREDIT TO THE EMPLOYER FOR WAGES PAID THE RETAINED EMPLOYEE

It would seem desirable to credit the employer with wages paid to the retained employee in order to encourage rehabilitation of the employee by the employer. It is apparent that an employer will be more likely to find work that an employee can manage if he knows he will not be forced to pay both wages and compensation. However, it would be erroneous to assume that all wages paid to an injured employee are gratuitous. In most cases it would seem that part of the wages paid during the retention period are earned and part of them are unearned. Thus the question of whether to allow the employer credit for the full wages paid or only for the unearned is presented. If the employer is given credit for all wages paid without drawing the distinction between those earned and unearned, the wages paid to the retained employee will offset compensation due him. This rule, if adopted, would be simple and easily administered. However, it might appear unfair to the employee who actually earns part of his wages. On the other hand, it seems that the employer who gratuitously rehires a disabled employee and places him in a position where he can earn his wages, should be given some consideration for his effort to help the employee. Thus from the employer's standpoint it seems fair to credit him at least with the unearned wages paid the retained employee.

The decisions which have dealt with the problem of wage credit for the retaining employer are in conflict in regard to the question of earned and unearned wages. The Supreme Court first held in *Hulo v. City of New Iberia*[12] that an employer would be credited with unearned wages only. The total credit allowed in this case was for the actual amount paid which was unearned

v. Louisiana Highway Commission, 52 So.2d 601 (La. App. 1951); Abshire v. Cities Service Refining Corp., 50 So.2d 307 (La. App. 1951).

11. Mottet v. Libbey-Owens-Ford Glass Co., 220 La. 653, 57 So.2d 218 (1952).

12. 153 La. 284, 95 So. 719 (1923).

and equal to the amount of compensation to which the employee was entitled.[13] However, the courts of appeal cases decided subsequently granted full credit for all wages paid, making no mention of the *Hulo* case.[14] Perhaps the courts of appeal felt that wages paid for lighter work were in fact gratuitous and in the nature of compensation. The Supreme Court seemed to align itself with the latter decisions when it next considered the problem in *Carlino v. United States Fidelity & Guaranty Co.*,[15] where it held that there was no cause of action for compensation for those weeks wages were paid for lighter work, whether earned or unearned.[16] The *Carlino* case was adhered to by the courts of appeal even where evidence conclusively established that the retained employee actually earned his wages.[17] However, in its latest decision, the Supreme Court limited the *Carlino* case by holding that credit would not be allowed where the employee earned his wages at *different* lighter work.[18] The court may have been motivated by the above-mentioned policy that it seems unfair to credit the employer with wages the employee actually earned. This may be especially true where the employee is earning his wages at work different from that previously done and where he is able to handle all aspects of the work. Thus it may be said that the Supreme Court will make no distinction between earned and unearned wages with respect to credit, unless the

13. In the *Hulo* case the court allowed the employer credit for wages paid over the amount earned to the extent which wages so paid exceeded the amount of compensation to which claimant was entitled. Thus, if claimant was receiving $60 per month over the amount earned, and he was entitled to $30 per month compensation, the employer would get credit for two months compensation each time the $60 was paid.

14. Hennen v. Louisiana Highway Commission, 178 So. 654 (La. App. 1938); Becton v. Deas Paving Co., 3 La. App. 683 (1926).

15. 196 La. 400, 199 So. 228 (1940).

16. The *Carlino* case also established a new method of determining the amount to be credited. The court held that the employer would be credited for the number of weeks worked regardless of the amount of wages paid.

17. Arbo v. Maryland Casualty Co., 29 So.2d 380 (La. App. 1947); Daigle v. Higgins Industries Inc., 29 So.2d 374 (La. App. 1947); Sumrall v. E. I. Dupont de Nemours & Co., 1 So.2d 430 (La. App. 1941). Numerous cases followed *Carlino* with respect to credit for unearned wages. Hingle v. Maryland Casualty Co., 30 So.2d 281 (La. App. 1947); Rigsby v. John W. Clark Lumber Co., 28 So.2d 346 (La. App. 1946); Fisher v. Standard Acc. Ins. Co., 28 So.2d 59 (La. App. 1946); Gautreau v. Maryland Casualty Co., 28 So.2d 96 (La. App. 1946); Annen v. Standard Oil Co. of New Jersey, 28 So.2d 46 (La. App. 1946); Vega v. Higgins Industries Inc., 23 So.2d 661 (La. App. 1945); Butzman v. Delta Shipbuilding Co., 21 So.2d 80 (La. App. 1945); McKenzie v. Standard Motor Car Co., 15 So.2d 115 (La. App. 1943).

18. See Mottet v. Libbey-Owens-Ford Glass Co., 220 La. 653, 57 So.2d 218 (1952). The case has been adhered to by the court of appeal in White v. Calcasieu Paper Co., 96 So.2d 621 (La. App. 1957); Myers v. Jahncke Service, Inc., 76 So.2d 436 (La. App. 1954).

employee is rehired to do different lighter work. In the latter case credit will be allowed to the employer only for unearned wages paid to the retained employee.

PREMATURITY

Prior to its amendment in 1926 the prematurity provisions of the Workmen's Compensation Act granted the employee access to the courts any time a dispute existed between him and his employer as to his claim.[19] This was held to be the case even though the employee was receiving maximum compensation at the time suit was filed.[20] The 1926 amendment provides that a suit will be premature and dismissed unless the employee alleges that his employer is not paying and has refused to pay the "maximum percent of wages" to which the employee is entitled.[21] Hence, as amended the statute allows payment of maximum compensation to bar a suit as premature even though a dispute might exist as to other aspects of the claim.[22]

Since the retained employee is receiving wage payments, an employer would plead prematurity if the retained employee sued to establish his right to compensation. Thus the question is presented as to whether wages paid to a retained employee may be considered as maximum percent of wages within the meaning of the statute dealing with prematurity. Although an earlier case seemed to indicate that a suit brought while an employee was receiving wages for lighter work would be premature,[23] the Supreme Court decided in the *Carlino*[24] case that such a suit would not be dismissed as premature.[25] While the court in the *Carlino* case did not expressly hold that wages paid were not to

19. La. Acts 1914, No. 20, § 1, provided in part: "Be it further enacted, etc., that in case of a dispute over, or failure to agree upon a claim for compensation between employer and employee, or the dependents of the employee, either party may present a verified complaint to the Judge of the Court which would have jurisdiction in a civil case. . . ." Section 18(4) further provided that if the above was complied with "the Judge shall decide the merits of the controversy."

20. Hulo v. City of New Iberia, 153 La. 284, 95 So. 719 (1923); Daniels v. Shreveport Producing & Refining Corp., 151 La. 800, 92 So. 341 (1922); Ford v. Fortuna Oil Co., 151 La. 489, 91 So. 849 (1922); Note, 3 LOUISIANA LAW REVIEW 837 (1941); Comment, 20 TUL. L. REV. 148 (1945).

21. LA. R.S. 23:1314 (1950).

22. Moss v. Levin, 10 La. App. 149, 119 So. 558 (1929); Pitts v. M. W. Kellog Co., 186 So. 389 (La. App. 1939); Reiner v. Maryland Casualty Co., 185 So. 93 (La. App. 1938).

23. See Ulmer v. E. I. Dupont de Nemours and Co., 190 So. 175 (La. App. 1939).

24. Carlino v. United States Fidelity and Guaranty Co., 196 La. 400, 199 So. 228 (1940).

25. *Ibid.*

be considered as maximum percent of wages this would be the logical inference from the decision. The next decision dealing with the question interpreted the *Carlino* case as being authority for the rule that wages paid the retained employee are not to be considered as maximum precent of wages within the meaning of the statute.[26] The court explained that the reason a suit is premature is because of the failure of the employee to allege that the employer has not paid him compensation, not because the employee fails to allege that the employer has not paid him wages.[27] Thus, only compensation would operate to bar a suit and wages paid a retained employee would not be considered as compensation. The *Carlino* case has since been restricted by the court to instances where *earned wages* were paid.[28] Unearned wages are treated as compensation and thus a suit brought while such are being received would be premature under the statute.

PRESCRIPTION OF THE CLAIM

A. Interruption

The Workmen's Compensation Act provides for a one-year prescriptive period which will run from the time of the accident.[29] It further provides that prescription will be interrupted by compensation payments.[30] The prescription problem with reference to the retained employee is whether wages paid as compensation payments will interrupt prescription.

Originally, the word *payment* in the statute was construed literally to mean payments made as compensation according to agreement between the parties.[31] Hence, wages paid a retained employee were not considered as payments within the meaning of the statute and would not interrupt prescription unless the parties had so agreed.[32] However, the courts later adopted a different position relative to the retained employee, treating wages paid him as payments that would interrupt prescription.[33] This was perhaps motivated by the fear that if prescription were

26. Thornton v. E. I. Dupont de Nemours & Co., 207 La. 239, 21 So.2d 46 (1944).
27. *Ibid.*
28. D'Antoni v. Employers Liability Assur. Corp., 213 La. 67, 34 So.2d 378 (1948).
29. LA. R.S. 23:1209 (1950).
30. *Ibid.*
31. Brister v. Wray Dickinson Co., 183 La. 562, 164 So. 415 (1935).
32. *Ibid.*
33. Carpenter v. E. I. Dupont de Nemours and Co., 194 So. 99 (La. App. 1940).

allowed to run while wages were being paid, the employer would rehire the employee for a year and then dismiss him.

It appears that the rule allowing wage payments to a retained employee to interrupt prescription on his compensation claim still obtains in Louisiana with some modification. The modification was probably the result of the *Carlino* case, wherein the court held that a suit by a retained employee was not premature although brought while he was receiving wages.[34] In cases arising thereafter where prescription was the issue, the courts seemed to feel that if wages paid the retained employee were not compensation for prematurity purposes, then they should not be regarded as compensation for purposes of prescription.[35] However, as pointed out before, the courts began to make a distinction between earned and unearned wages in cases involving prematurity.[36] The same distinction arose in cases dealing with prescription.[37] The net result is that the term *payment* in the statute still includes wages paid the retained employee, but only if they are *unearned.* The rationale is that if unearned wages are compensation so as to make a suit premature then they of necessity must be compensation so as to interrupt prescription.

Since the court has brought the distinction between earned and unearned wages into the prescription analysis, the recurring problem of deciding when wages are earned must be considered in each case. The answer, of course, will depend upon the facts of each case. However, it has been held that wages are not unearned simply because an injured employee was paid for lighter work.[38] One case went so far as to hold that there must be an implied understanding between the interested parties before wages paid a retained employee could be considered payments

34. 196 La. 400, 199 So. 228 (1940).

35. See Arnold v. Solvay Process Co., 15 So.2d 238 (La. App. 1943), where the court considered that the *Carlino* decision should be controlling in a case involving the question of whether wages paid the retained employee interrupted prescription. This case was affirmed by the Supreme Court at 207 La. 8, 20 So.2d 407 (1944) on the grounds that the suit was for specific injury and in such circumstances the wages paid after injury should not interrupt prescription. Also in Thornton v. E. I. Dupont de Nemours & Co., 207 La. 239, 21 So.2d 46 (1944), the court seemed to agree that prescription and prematurity were interrelated so that if a plaintiff could proceed because its action was not premature, prescription should not be interrupted.

36. D'Antoni v. Employers Liability Assurance Corp., 213 La. 67, 34 So.2d 378 (1948); Thornton v. E. I. Dupont de Nemours & Co., 207 La. 239, 21 So.2d 46 (1944).

37. See note 10 *supra.*

38. See note 10 *supra.*

made in lieu of compensation.[39] This is a very restricted view in comparison with the old rule that any wages paid the retained employee interrupted prescription.[40]

B. Commencement of Prescription

Normally prescription begins to run at the time of the accident.[41] However, by amendment to R.S. 23:1209 it will not begin to run at the time of the accident if, at that time, the injury does not develop. This becomes important in the retained employee situation when the employee earns his wages. The question then arises as to whether the injury has developed when the employee is able to earn his wages.

The jurisprudence is well settled that the employee is considered disabled within the meaning of the compensation statute and therefore entitled to compensation when he cannot do work of reasonably the same nature as that done before the accident.[42] Further, if he does the same work but in pain and suffering he is still considered disabled.[43] Thus the retained employee is entitled to compensation. It would seem that since he is entitled to compensation, prescription would be running on his claim the whole time he delayed in bringing it. However, in the case of *Mottet v. Libbey-Owens-Ford Glass Co.*[44] the employee was injured and then rehired to do lighter work. Thus he was a retained employee. After a year had elapsed from the accident he was forced to quit even the light work. In answer to a plea of prescription by the employer, the Supreme Court held that prescription began to run from the day he quit work, not from the time of the accident. The court stated that it was mere conjecture to say that the employee was disabled at the time of the accident when he earned wages thereafter. This would seem to conflict with the jurisprudence that an employee is disabled and thus entitled to compensation when he works in pain and

39. Wallace v. Remington Rand, Inc., 76 So.2d 87 (La. App. 1954), overruled at 229 La. 651, 86 So.2d 522 (1956), on another point.

40. Carpenter v. E. I. Dupont de Nemours and Co., 194 So. 99 (La. App. 1940).

41. This is illustrated by the language of LA. R.S. 23:1209 (1950), which provides that all claims for compensation "shall be barred forever unless within one year *after the accident*" payments have been agreed upon or proceedings have been begun. (Emphasis added.)

42. E.g., Knispel v. Gulf States Utilities Co., 174 La. 401, 141 So. 9 (1932); McQueen v. Union Indemnity Co., 136 So. 761 (La. App. 1931).

43. Hingle v. Maryland Casualty Co., 30 So.2d 281 (La. App. 1947); Maleby v. Gulf Refining Co., 1 La. App. 68 (1924).

44. 220 La. 653, 57 So.2d 218 (1952).

suffering or when he cannot do work of the same reasonable nature as that done before the accident. Under the *Mottet* rule as interpreted by subsequent cases, although an employee working in pain and suffering will not, because of this, be precluded from bringing his action for compensation, nevertheless he will not be forced into bringing such an action because of the rules relative to prescription.[45] Although seemingly inconsistent, these rules probably reflect sound policy. As stated by Professor Malone, "considerations of fairness would induce a court to retreat from the prospect of penalizing the employee for his effort to continue working in pain in hope that his condition will become better."[46]

The *Mottet* case has been consistently followed by the Supreme Court and the courts of appeal.[47] Thus it appears that if the courts find the wages paid the retained employee are unearned, prescription will run from the time of the accident but will be interrupted by the payments.[48] On the other hand, if wages paid the retained employee are earned, prescription will not begin to run until the employee quits or is dismissed.[49] It seems that every encouragement for rehabilitation is being offered by the courts in this area.

CONCLUSION

The present status of the law relative to the retained employee seems to leave much to be desired from the standpoint of policy. Policy dictates that rehabilitation of the injured employee be favored. However, the distinction drawn between earned and unearned wages in the field of credit and prescription tends to have an adverse effect on rehabilitation. An em-

45. Bynum v. Maryland Casualty Co., 102 So.2d 547 (La. App. 1958). See also Wallace v. Remington Rand, Inc., 229 La. 651, 86 So.2d 522 (1956).

46. MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE 79, § 384 (Supp. 1955).

47. Wallace v. Remington Rand Inc., 229 La. 651, 86 So.2d 522 (1956); Bynum v. Maryland Casualty Co., 102 So.2d 547 (La. App. 1958); France v. New Orleans, 92 So.2d 473 (La. App. 1957); Watson v. United States Tobacco Co., 87 So.2d 205 (La. App. 1956).

48. See Thornton v. E. I. Dupont de Nemours & Co., 207 La. 239, 21 So.2d 46 (1944); Chauvin v. St. Mary Iron Works, 55 So.2d 617 (La. App. 1951); Cradeur v. Louisiana Highway Commission, 52 So.2d 601 (La. App. 1951); Perkins v. American Employers Insurance Co., 53 So.2d 462 (La. App. 1951); Abshire v. Cities Service Refining Corp., 50 So.2d 307 (La. App. 1951).

49. See Wallace v. Remington Rand Inc., 229 La. 651, 86 So.2d 522 (1956); Bynum v. Maryland Casualty Co., 102 So.2d 547 (La. App. 1958); France v. New Orleans, 92 So.2d 473 (La. App. 1957); Watson v. United States Tobacco Co., 87 So.2d 205 (La. App. 1956).

ployer is not likely to find lighter work for the employee no longer able to perform regular work if wages paid therefor are considered earned and hence not credited against compensation due the employee. Further, the uncertainty present as to whether wages are actually earned or unearned may have a detrimental effect on an employee's claim. If the employee assumes his wages fall in the unearned classification but in actuality they do not, prescription will bar his claim. However, if the employee chooses to sue to establish his claim and avoid the risk of having it prescribe, he runs the risk of losing his job.

Thus it seems that, from a standpoint of policy, the distinction between earned and unearned wages in the problem areas of the retained employee should be abolished. This would definitely encourage rehabilitation, since the employer could be sure that he would not have to pay both wages and compensation. At the same time the employee could be sure that his claim is not prescribing since all the wages paid would interrupt prescription. As a result he would not be forced into court. It seems that rehabilitation should be a primary consideration of the courts; and since the elimination of the distinction between earned and unearned wages would encourage rehabilitation, there appears to be good reason for such elimination.

Hillary Crain

Strict Liability For Uses of Property Under the Louisiana Civil Code

Under the classic doctrine of *Rylands v. Fletcher*[1] the common law imposes liability on certain activities without a showing

1. Fletcher v. Rylands, 3 H. & C. 774, 159 Eng. Rep. 737 (1865), reversed in L.R. 1 Ex. 265 (1866), affirmed in L.R. 3 H.L. 330 (1868). In deciding the case, the court in the Exchequer Chamber said: "We think that the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." Fletcher v. Rylands, L.R. 1 Ex. 265, 279-80 (1866). In the House of Lords, it was stated that the principle applied only to a non-natural use of the defendant's land. Rylands v. Fletcher, L.R. 3 H.L. 330, 338 (1868). Since the *Rylands* decision, various terms for the rule have evolved, e.g., strict liability for abnormal things and activities (PROSSER, TORTS § 59 (2d ed. 1955)), liability for ultrahazardous activities (RESTATEMENT, TORTS § 519 (1938)). Dean Prosser states that today a doctrine based on the *Rylands* decision obtains in England and some twenty American jurisdictions. PROSSER, *op. cit. supra*, at 329, 333.